IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1113

CARLOS LOZADA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Second Department.

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1977

No._____

- X

CARLOS LOZADA,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

- X

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION, SECOND DEPARTMENT.

STATEMENT.

Petitioner respectfully prays that this Court issue a writ of certiorari to review the order of the New York Supreme Court, Appellate Division, Second Department, rendered the 16th day of May, 1977,

affirming the conviction of the defendant-appellant Lozada, petitioner herein, which conviction had been rendered the 23rd day of June, 1976, convicting him of murder second degree, after trial in the Supreme Court, Queens County.

Petitioner was sentenced to a term of 25 years to life imprisonment and is presently incarcerated.

OPINION BELOW.

The Appellate Division, Second Department, affirmed the judgment for murder second degree, rendering an opinion which is reproduced in the appendix hereto.

On the 9th of September, 1977, Judge Sol Wachtler, Associate Judge of the New York Court of Appeals, denied leave to appeal. A copy of Judge Wachtler's order is annexed.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Appellate Division, Second Department, affirmed the judgment of conviction on the 16th day of May, 1977, and Judge Sol Wachtler of the New York Court of Appeals denied leave to appeal on the 9th day of September, 1977. Associate Justice Thurgood Marshall of this Court extended petitioner's time to file for certiorari until February 6, 1978. A copy of that order is annexed, and it bears Supreme Court Number A-454.

QUESTIONS PRESENTED.

1. Whether petitioner was deprived of a fair trial under the Fourteenth Amendment of the United States Constitution, by virtue of the Trial Court's refusal to permit defendant's wife to testify concerning

his explanation of an alleged "flight" to Pennsylvania following the alleged homicide? (Sixth and Fourteenth Amendments.)

2. Whether petitioner was deprived of a fair trial by the conduct of the trial prosecutor, who injected his own credibility into the case, and the conduct of the trial judge, who badgered and argued with defense counsel in a prejudicial manner?

3. Whether petitioner was deprived of the equal protection of the laws under the Fourteenth Amendment because of the fact that apparently no 18-year-old prospective jurors were summoned to the array or the poll?

4. Whether petitioner was deprived of due process of law when the Trial Court refused to permit Lozada to interpose a defense of extreme emotional disturbance?

5. Whether petitioner was properly identified by two youngsters who were the main witnesses for the prosecution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Sixth and Fourteenth Amendments of the United States Constitution are involved.

INDICTMENT IN COURT BELOW.

The Indictment number in the Court below was returned in the Supreme Court, Queens County, 1868/75.

The indictment charged the defendant with having murdered an individual in Queens County, as a result of an altercation concerning an automobile. Very dubious identification procedures were conducted during a lineup.

The very youthful witnesses were really unable to identify the defendant as the perpetrator, but after considerable equivocation, a very questionable identification emerged.

The petitioner herein has exhausted his funds and is unable to pursue this matter with the type of brief he would prefer. We therefore ask that this Court subpoena the briefs and files of the State Courts, under the aforesaid indictment number (1868/75), and the records of the Appellate Division, Second Department, under number 779-E, which is that Court's control number.

The petitioner incorporates by reference all of the briefs and arguments made and filed in the Court below.

REASONS FOR GRANTING CERTIORARI.

The questions presented, *supra*, set forth the issues upon which review is sought. The petitioner herein was prevented from utilizing the testimony of his wife on a very important matter, namely to explain the alleged reason for his flight. We maintain that this ruling violated petitioner's rights under the Sixth Amendment of the United States Constitution, which mandates that he be permitted to call witnesses in his behalf.

The petitioner was further prejudiced by virtue of the identification procedures utilized, which, in essence, were grossly insufficient to have warranted Lozada being charged with this crime. Extremely young children were primarily the witnesses relied upon and they were unable to identify the petitioner. The identifications

that ultimately emerged were very equivocal and totally unreliable.

Moreover, petitioner was obviously tried before a jury which numbered no 18-year-olds among them (*Taylor v. Louisiana*, 419 U. S. 522 [1975]).

The defense counsel was made to look foolish and was insulted by the Trial Judge, who harangued him throughout the trial. The prosecutor vouched for the credibility of certain witnesses, thereby depriving petitioner of a fair trial.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK,
A Member of the Bar of
this Court,
Attorney for Petitioner.

APPENDIX.

ORDER OF AFFIRMANCE BY APPELLATE DIVISION.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 16, 1977.

HON. M. HENRY MARTUSCELLO,
Justice Presiding
HON. HENRY J. LATHAM,
HON. J. IRWIN SHAPIRO,
HON. FRANK D. O'CONNOR,
Associate Justices

- X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

CARLOS LOZADO,

Appellant.

- X

In the above entitled action, the above named Carlos Lozado, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Queens County, rendered June 23, 1976, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence; and the said appeal having been argued by Irving Anolik, Esq., of counsel for the appellant, and argued by Barry A. Schwartz, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion & decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

ENTER:

IRVING N. SELKIN
Clerk of the Appellate
Division

OPINION OF APPELLATE DIVISION.

AD 2d A - April 28, 1977

- X

779 E

THE PEOPLE, etc.,

Respondent,

v.

CARLOS LOZADA,

Appellant.

- X

Irving Anolik, New York, N. Y., for appellant.

John J. Santucci, District Attorney, Kew Gardens, N. Y. (Barry A. Schwartz of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Queens County, rendered June 23, 1976, convicting him of

murder in the second degree, upon a jury verdict, and imposing sentence.

Judgment affirmed.

Defendant was indicted for murder in the second degree. An overwhelming amount of circumstantial and direct evidence was introduced at the trial to establish that the defendant had been embroiled in an altercation with the victim over a double-parked car which blocked the street and that, when the victim grabbed the defendant's shirt, the defendant retaliated by shooting the victim in the chest and head four times at very close range. A review of the trial transcript reveals that the relationship between opposing counsel during this lengthy trial deteriorated to a thoroughly unprofessional level of accusation, gesture and innuendo. Under these

difficult and trying circumstances, the trial court showed great restraint in dealing with both sides and, at times, justifiably resorted to "aggressive control of the proceedings to ensure a fair trial" (see *People v. Gonzalez*, 38 N. Y. 2d 208, 210).

We have considered the other contentions of the defendant and find them to be without merit.

MARTUSCELLO, J.P., LATHAM, SHAPIRO and O'CONNOR, JJ., concur.

May 16, 1977

CERTIFICATE OF JUDGE SOL WACHTLER DENYING LEAVE TO APPEAL TO COURT OF APPEALS.

STATE OF NEW YORK

COURT OF APPEALS.

BEFORE: HON. SOL WACHTLER, Associate Judge

- X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

CARLOS LOZADO

- X

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to

CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
September 9, 1977

SOL WACHTLER
Associate Judge

* Description of Order: Judgment of Supreme Court, Queens, June 23, 1976; affirmed by Appellate Division, Second Department, May 16, 1977.

ORDER OF SUPREME COURT EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES

- X

No. A-454

CARLOS LOZADO,

Petitioner,

v.

NEW YORK

- X

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a writ of certiorari in the above-

entitled cause be, and the same is hereby, extended to and including February 6, 1978.

/s/THURGOOD MARSHALL
Associate Justice of
the Supreme Court of
the United States

Dated this 22nd day of
November, 1977.

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1113

CARLOS LOZADA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

RESPONDENT'S BRIEF

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IN THE

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No. 77-1113

CARLOS LOZADA,

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against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

RESPONDENT'S BRIEF

Introduction

This is a brief in behalf of respondent in opposition to a petition for a writ of *certiorari* to an intermediate appellate court of the State of New York, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

On June 23, 1976, the petitioner was sentenced by the Honorable Francis X. Smith, Justice of the Supreme Court of the State of New York, Criminal Term, Queens County, after a trial by jury, wherein the petitioner was convicted of murder in the second degree to a term of imprisonment of not less than 25 years nor more than life.

On May 16, 1977, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, issued an order unanimously affirming, in a memorandum opinion, the judgment of conviction. The aforementioned order and memorandum opinion are included as part of petitioner's appendix in support of his petition for a writ of *certiorari*.

On September 9, 1977, the Honorable Sol Wachtler, Associate Judge of the Court of Appeals, issued an order pursuant to §460.20 of the Criminal Procedure Law of the State of New York denying petitioner's application for permission to appeal the order of the Appellate Division to the Court of Appeals. A copy of that order is also part of the appendix in support of petitioner's application for a writ of *certiorari*.

Opinion Below

The Appellate Division, Second Department, affirmed the judgment for murder, second degree rendering an opinion which is reproduced in petitioner's appendix. On September 9, 1977, the Honorable Sol Wachtler, Associate Judge of the Court of Appeals, denied leave to appeal. A copy of Judge Wachtler's order is also reproduced in petitioner's appendix.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC §1257 (3). The Appellate Division, Second Department, affirmed the judgment of conviction on 16th day of May, 1977 and the Hon. Sol Wachtler of the New York Court of Appeals denied leave to appeal on the 9th day of September, 1977. Associate Justice Thurgood Marshal of this Court extended petitioner's time to file for *certiorari* until February 6, 1978. A copy of that order is also part of petitioner's appendix in support of his petition for a writ of *certiorari*.

Questions Presented

1. Whether petitioner was deprived of a fair trial under the Fourteenth Amendment of the United States Constitution, by virtue of the Trial Court's refusal to permit defendant's wife to testify concerning his explanation of an alleged "flight" to Pennsylvania following the alleged homicide? (Sixth and Fourteenth Amendments.)

2. Whether petitioner was deprived of a fair trial by the conduct of the trial prosecutor, who injected his own credibility into the case, and the conduct of the trial judge, who badgered and argued with defense counsel in a prejudicial manner?

3. Whether petitioner was deprived of the equal protection of the laws under the Fourteenth Amendment because of the fact that apparently no 18-year old prospective jurors were summoned to the array or the poll?

4. Whether petitioner was deprived of due process of law when the Trial Court refused to permit Lozada to interpose a defense of extreme emotional disturbance?

5. Whether petitioner was properly identified by two youngsters who were the main witnesses for the prosecution?

Constitutional and Statutory Provisions Involved

The Sixth and Fourtenth Amendments to the United States Constitution are involved.

Statement of Facts

The Trial

Catherine Barris testified that the deceased, Daniel Georgi, was her brother-in-law. On July 29, 1975, she was employed by her brother-in-law at a printing center in Brooklyn (69).* At about 5:30 p.m. that evening, she, Georgi, and her sister Corinne, who also worked at the shop, left work and went to a bar for a drink (71). Although she herself did not have a drink, she recalled that Georgi had two mixed drinks (71-72). They remained at the bar for perhaps a half-hour and then went to a parking lot and picked up Georgi's car (72). They got into the car and drove back to Queens. They proceeded east on Hillside Avenue, turned right at 169th Street, and left on 90th Avenue. Halfway down the block, they stopped the car in front of 196-20 90th Avenue. This address is where the witness lived (74). The car, which was a Pontiac Catalina convertible, had its top down. Her sister got

* Numerical references are to pages of the trial transcript.

out of the car and went into the house. The witness stayed in the car speaking to her brother-in-law.

While the two remained in the car, a green car pulled up behind them and honked his horn five or six times. Catherine turned to look at the car and said, "He looks like he's in a hurry, you might as well go and I'll talk to you tomorrow" (74). Georgi agreed and Catherine got out of the car. She described 90th Avenue as a two-way street with room for cars to park on both sides of the street. She testified that while her brother-in-law was not double parked, he was approximately half-way into the parking lane. She further testified that there was no curb at that part of the street (75-76).

She recalled that there were no cars parked on the opposite side of the street from where her brother-in-law's car was. Her brother-in-law drove off to the end of the street and stopped at the corner. The green car pulled up behind him and stopped abruptly. She could hear the screeching of brakes. The green car, in fact, had almost hit her.

After stopping, her brother-in-law turned, waved to her, and proceeded to the next block (76-77). Catherine walked toward her house. Before she got to the house, however, a friend of hers named Sam pulled up in his truck. She went back to the street to say hello to him. At that time she heard a loud noise. She looked down the block and saw a lot of people. Sam got back in his truck and drove down the block. While looking in that direction she saw the green car back up to 197th Street, and turn north to Hillside Avenue (77). She described the car in

question as a green 4-door hardtop. The driver was tall, with black hair and a black mustache. She was unable to identify the defendant as the driver of the car (80).

On cross-examination, she indicated that while she and her brother-in-law had been seated in the car in front of her house, another car, driven by her mother, was able to pass around the parked car and continue down the street (87).

Samuel Gates testified that on July 29, 1975, he drove his truck to the Barris house. As he parked his truck, he saw the deceased in his car pulling away from the curb with another car behind him. Gates stopped his truck, shut off his engine, and started to walk toward the house. As he approcahed the house he heard what sounded to him like firecrackers. He then heard screeching tires and screaming people. He observed a green car backing up on 90th Avenue toward 197th Street. Prior to reaching 197th Street, the green car backed into a driveway and then accelerated forward on 197th Street toward Hillside Avenue (132-33).

Gates ran back to his truck and drove to where a crowd of people were standing. He went through the crowd, bent over and observed that the deceased was lying in the street. He noted that he had been shot and unsuccessfully tried to find a pulse. The deceased was bleeding from the mouth and around the ears and had apparently been shot a couple of times (133-34).

Gates spoke to the Barris sisters and then re-entered his truck. He drove around the neighborhood asking peo-

ple if they had seen the green car. He was unsuccessful in his search. He then retrieved one of the Barris sisters' boyfriends and returned to the scene (134).

He recalled that the car in question was a 1972 or '73 green Chevrolet with tinted glass. He got but a glimpse of the driver of the car (135).

Edward Geraghty testified that on July 29, 1975, at approximately 7:00 p.m., he was in his home at 197-22 90th Avenue in Queens County when he heard a sound like fireworks. He then heard the squealing of car brakes and ran outside (149-50). He saw two of his children in the driveway and observed a green Chevrolet backing up on 90th Avenue. At that time he also observed someone lying in the street. He ran over to him, saw that he was dead and bleeding from his nose, eyes and ears. He got a blanket and covered the man (151).

At a later date, Mr. Geraghty was shown a vehicle which he identified as the car he had seen backing up 90th Avenue on the day of the crime (151-52). He testified that the Chevrolet had a distinctive front end. He examined People's Exhibits 2A, B, C and D and identified them as photographs of the green Chevrolet he had seen that evening (152-53).

He testified that the Chevrolet in question had an unusual amount of chrome on the front end which made it distinctive (156). When the police first interrogated Geraghty, he told them that he had gotten a glance at the license plate of the green Chevrolet and was able to recall the letters YZT (162).

Peter Osso, another resident of the street where the incident occurred, testified that he was standing across the street in his front yard talking to a friend when he heard shots (178). He saw the green Chevrolet backing up the street and observed the license plate number PBY 340, which he subsequently gave to the police (179-80).

Edward Geraghty, Jr., the ten-year old son of Geraghty Senior, testified that on July 29, 1975, at 7:00 p.m., while standing in his driveway, he heard two cars driving in front of his home. The first car stopped at the corner and the second one behind it. He heard the beeping of the horn. The man in the first car got out of his car and walked toward the front of the second car. The driver of the second car got out. The man in the first car grabbed the man from the second car by the collar and shook him (190). The man from the first car then said, "What are you some kind of old—[the witness was unable to recall the last word]." The man from the second car then said, "I'm going to shoot you." He then pulled out a gun and shot him four or five times. His first shot was to the stomach. As the man who was shot was falling, the shooter raised his arm and continued to fire downward (191-92). He was unable to identify the driver of the green car (263). He did describe the man as being about 5'7", weighing 155 pounds, with black hair (264). He observed a lineup on a subsequent occasion which contained the defendant but he was unable to make an identification (294).

Kevin Simberlund, a 16-year old boy, testified that he was with his friend Paul Fitzgerald at the time and place in question. He reiterated Fitzgerald's version of the incident and identified the photographs as depicting a car

that looked exactly like the green Chevrolet (299-306). His description of the driver of the green Chevrolet was sketchy and he did not identify the defendant (306).

Eugene Livingston testified that he saw the green Chevrolet backing up 90th Avenue and driving up 197th Street toward Hillside Avenue. He identified photographs, People's Exhibits 2 A-D as the car in question (320-23).

Rafael Cruz, a 13-year old boy, testified that at the time and date in question he was standing on 197th Street on a stoop (363). He observed two cars driving on 90th Avenue, one behind the other, and one car honking his horn (364). While Cruz continued to talk to his friend, Joseph Burnett, on whose stoop they were standing, he heard a sound like firecrackers. A moment later, he heard screaming and the sound of the tires of a car. He saw the car, a green Chevrolet Impala, backing up 90th Avenue into 197th Street and then, "tore up the block" toward Hillside Avenue. As the car passed Cruz he was able to see the driver of the car. He described him as being short with a mustache (365). He also thought he was Hispanic.

At a later date, Cruz went to a lineup and identified the driver of the car. He made an in-court identification of the defendant as the man he had seen in the lineup (366-67).

Arthur Verdecchia testified that he was 13 years old (444). On July 29, 1975, at approximately 7:00 p.m., he was playing with Eddie Geraghty in Eddie's driveway (445-46). At that time he observed a blue car driven by the deceased, Mr. Georgi, who the witness had previously

known, stop at the corner of 90th Avenue and 198th Street. He described Mr. Georgi's car as a blue convertible with the top down (447-48). The other car stopped directly behind Mr. Georgi's car. Both men got out of their cars. Mr. Georgi grabbed the second man's shirt and the second man then pulled out a gun and shot him (448). He testified that the second car was a green Impala and that he thought he might have seen the driver of the car once before (449).

He testified that he raised his right hand and shot Mr. Georgi 4 times. Mr. Georgi then leaned against a parked car and fell to the ground. The driver of the green car got back in his car and backed up the street (450). The witness testified that he next saw the driver of the green car at a lineup where he selected the man from amongst the others. He also identified the green car shown at him at a later date by a detective as being the car driven by the man who shot Mr. Georgi (455-56). At trial, he identified the photographs of that car as the car he observed at the crime scene (456).

He observed the man while he was in the car, while he was on the street doing the actual shooting, and while he was in the car again backing up the street (458). He then identified the defendant in court as the man who shot Mr. Georgi (459).

Detective **Peter Cifuni** testified that on July 29, 1975, he responded to the scene of a homicide at 90th Avenue and 198th Street in Queens County. At that time, he spoke to a Peter Osso, who gave him a license plate number, 304 BPY. The following day he gave that license plate number to Detective Cama of the Homicide Squad (534-35).

Police Officer **Benny Scollo** was the recorder in a radio motor patrol car that responded to the crime scene at approximately 7:07 on the night of the homicide (552-53, 569). On arrival, he observed the body of the deceased on the ground in the street covered with a blanket (554). The officer safeguarded the scene and roped off the area. He then searched the area and recovered four spent shells, a live one and one spent bullet (555-56).

The next day the officer responded to the Medical Examiner's Office and identified the body of the deceased, Daniel Georgi, as the body he had seen at the scene of the crime (559-60).

During Patrolman Scollo's cross-examination, the radio communications during that time were introduced into evidence and read into the record. One section refers to a call from retired Sergeant Griffo, stating possible homicide. Another call reflected license 340 BBA, white male driver, green Chevy Impala. Thereafter, another reference indicated a call at 7:12, a green Impala 360 BPY last seen west on 90th Avenue. An additional call reflected new possible plates, 304 PBY or 340 BPY (585-86). Finally, a notation, homicide on scene—Daniel Georgi, male white, 32, of 88-18 212 Street, was in altercation with unidentified male who shot aided and fled in a green Chevy Impala, 304-BPY, New York (587).

Detective **Bruce Brennan** of the 16th Homicide Squad testified that on July 30, 1975, he was asked to determine the owner of a New York license plate 304 YBP. He ascertained that the vehicle was owned by a Francis Vasquez of 383 North Bergen Avenue, Staten Island, and that it was

registered to a 1973 green Chevrolet two-door sedan (635-36).

Prior to receiving that information, he had spent several hours trying to verify the various possible combinations of license plate number 304 YBP. What he was attempting to do was to ascertain the owner of a late model green Chevrolet owned by a possible Hispanic person in the New York City area. This technique of investigation is known as "boxing" in police jargon (636).

On cross-examination, Detective Brennan indicated that he had checked other numbers such as 206 PBY and 204 BPY (641), as well as various other numbers (645-47).

Detective **Anthony Cama** of the 16th Homicide Squad testified that he received a plate number from Detective Brennan, 304 YBP (669). He also testified that as a result of the homicide investigation, he sent out an alarm for one Carlos Lozada for the crime of homicide of one Daniel Georgi (673). The alarm went out to 13 different states (674). He also telephoned a Trooper McAndrew of the Pennsylvania State Police and asked him to respond to Reedman Auto Parts in Langhorn, Pennsylvania, in order to try and apprehend Carlos Lozada. He advised the trooper that Lozada may be in possession of a 1973 Chevrolet two-door sedan, New York registration 304 YBP and further advised him that he was wanted for the homicide of Daniel Georgi (675). He transmitted this information to Trooper McAndrew on July 31, 1975.

On cross-examination, Detective Cama indicated that his investigation had revealed that Lozada intended to ex-

change his car and buy a new one at Reedman Motors in Langhorn, Pennsylvania (686).

Detective **Robert Breglio**, a ballistics expert, testified that the shells recovered from the crime scene were all fired from the same pistol (693-95).

Dr. **Frank Presswalla** testified that he is an Associate Medical Examiner of the City of New York (715-16). On July 30, 1975, he conducted an autopsy on a person identified to him as being the body of Daniel Georgi. The body identification was made by Richard Schuller and the first officer identification was made by Police Officer Benny Scollo (717). Mr. Georgi died as a result of bullet wounds to the head, chest and brain (717). The deceased was struck by five bullets. One entered the left nostril and lodged in the brain. Two others entered the left temple. One of those lodged in his brain and the other exited on the other side of the head after having gone through the brain (718). A fourth bullet grazed the right cheek. This wound had powder burns. The fifth bullet wound entered the right chest and exited from the right back. In addition, Dr. Presswalla noted pinpoint abrasions on the back of the deceased's right hand, which were consistent with a spray of powder. The powder burns indicated to Dr. Presswalla that the bullets were fired from a distance of approximately 12" (719-20).

On cross-examination, Dr. Presswalla indicated that a blood test revealed that it contained .017% alcohol (731).

Trooper **James McAndrew** of the Pennsylvania State Police, testified that he received a telephone communication

on July 31, 1975, from Detective Cama of the New York City Police Department (734). As a result of that conversation, he contacted the security manager of Reedman Motors on Route 1 in Langhorn, Pennsylvania (735). The security manager's name is Charles Schweitzer (735). He asked Mr. Schweitzer if he had been contacted by a man named Carlos Lozada (735-36). He advised him that Mr. Lozada was driving a 1973 Chevrolet, green in color, license plate 304 YBP, New York registration. He also told Mr. Schweitzer that Mr. Lozada was wanted in New York City relative to a murder investigation (736). Mr. Schweitzer told Trooper McAndrew that the car in question was there. Trooper McAndrew then proceeded to Reedman's, where he learned that Lozada would be coming to a particular location in order to pick up his new car (737). He stationed himself at that location and subsequently saw the defendant, Carlos Lozada, and placed him in custody (738).

At the time he initially saw Lozada, he was pulling into the delivery area with a 1973 Chevrolet. He was driving the vehicle and had a female passenger named Frances Vasquez. He noted that the registration number on the vehicle was 304 YBP New York (739). Lozada identified himself by name and told him that he resided at 90-61 198th Street, Hollis, Queens (740). The Chevrolet was also taken into police custody (741).

Trooper McAndrew identified the photographs of the car as being the one he had taken into custody (742).

The Defense

Detective **Joseph Aniano** of the 16th Homicide Squad testified that he was assigned to investigate this homicide on July 29, 1975. He arrived at the scene of the homicide at approximately 7:55 p.m. that day. He conversed with Detective Cifuni and several other people upon arrival (823).

Defense counsel introduced a DD5 prepared by Detective Aniano reflecting an investigation conducted by Detective Cifuni (829).

Detective Aniano then related a conversation he had with Catherine Barris in which she described what she knew about the incident (832-33). Aniano also testified that he went down to Pennsylvania and observed certain property in the green Chevrolet that was recovered there (839-40). On August 1, 1975 Detective Aniano arrested Carlos Lozada in Pennsylvania (873).

The lineup conducted by Detective Aniano was commenced at approximately 7:25 p.m. on August 1, 1975 (900). Approximately seven people viewed the lineup at that time (901). Prior to arriving from Pennsylvania with the prisoner, Detective Aniano spoke to defense counsel, Mr. Lopez, advising him that a lineup would be conducted. Other police officers arranged to have five other members to be part of the lineup. Each man was given a number, ranging from 1 to 6. The prisoner was permitted to select the number of his choice and was permitted to select the spot in the lineup that he desired to stand. The witnesses observed the lineup through a one-way mirror. Detective

Aniano, Sergeant Leinberger, defense counsel and Assistant District Attorney McGann were present at the lineup. Each witness was asked three questions, the answers to which were noted on a form (902-03).

Ed Geraghty was the first to view the lineup. The second person to view the lineup was Arthur Verdecchia (925); then Catherine Barris, Thomas Geraghty, Rafael Cruz, Paul Fitzgerald and Ann Hart. Ms. Hart was a woman in her 30's or 40's (926). Detective Aniano was told by Arthur Verdecchia at the lineup that he recognized the defendant because he had seen him at the accident and that the defendant had turned around and that he saw his face when he was shooting the man (928).

Catherine Barris identified one of the killers, a Mr. Constantino, as being the man who committed the crime (928-29). Thomas Geraghty also picked out Mr. Constantino (930). Paul Fitzgerald indicated that he was unable to recognize anyone. Rafael Cruz identified Carlos Lozada as having been seen on 197th Street driving very quickly at approximately 7:00 p.m. the day of the murder (931-32).

Mr. Lozada's car did not have tinted glass, although viewing it from the outside it appeared that the glass was tinted(976-77).

Arthur Imperiale testified that on July 29, 1975, he was a foreman at Perini Associates in Manhattan (1026-27). At that time Carlos Lozada had been employed by that company as a laborer for the past 7 or 8 months (1027). At around a quarter after 5:00 or 5:30 that evening, Mr. Imperiale saw Carlos at 132 Eldridge Street near the home

of the defendant's mother (1031). He was able to recall the time and date because Lozada had not come to work that day. This is why Imperiale went to see him. Lozada told him that he had to go to court that day.

The witness also recalled that his wife came over with the car and he also recalled that there were other fellows hanging around. 132 Eldridge Street was a candy store. He remembered that Lozada was fooling around, sparring for about one-half hour (1032). In the back of the candy store there were heavy punching bags and weights on which Lozada was working out. After Lozada's wife arrived, the defendant and some other men went over to work on the car (1033). They did not succeed in fixing the car. Inasmuch as Mrs. Lozada had to get a formula for the baby the witness loaned her his car.

He recalled last seeing Mrs. Lozada at that address between 6:30 and twenty to 7:00. Mr. Imperiale left the area a few minutes after 7:00 (1035).

Detective **Robert Frank** of the 16th Homicide Squad was called to the stand. He testified as to his conversation with Catherine Barris, on July 29, 1975, wherein she related her version of the incident (1082-84). He also related a conversation that he had on the day of the incident with Edward Geraghty (1086-88). Similarly, Frank testified about his conversation with Arthur Verdecchia (1090-92).

Mabel Lozada testified that she is the sister of the defendant and resides at 132 Eldridge Street. On July 29, 1975, at approximately 5:30 p.m. she saw her brother enter their house (1103-07). She left the house at approximately

5 minutes to 7:00. As she left the house she saw Lozada downstairs talking to his boss. She recalled a conversation with Lozada concerning a mechanical breakdown of his car. They stood talking together for about 15 minutes and then she left at about 7:15 (1108-09).

Juana Lozada, the mother of Carlos Lozada, testified that she has lived at 132 Eldridge Street for approximately 11 years. She first saw Carlos on the day of the homicide on July 29, 1975, in the morning (1119). Lozada came to her house with his wife and three children (1119). Lozada left and then returned at about 5:00 p.m. At about 6:00 p.m. his wife Frances came back to the house. She came to the house with a friend named Aida. She left the house with Aida at about 6:30 (1120-21). She again saw Carlos at 7:00 p.m. Carlos stayed at the house until about 10:15 p.m. (1121).

Jose Ventura testified that he owned a grocery store at 130 Eldridge Street next to 132 Eldridge Street (1133). He recalled seeing Carlos Lozada on July 29, 1975, between 7:00 and 7:30 in the evening. At that time the witness was unloading a truck. He observed Lozada in front of the building where his parents lived (1135). He noted that Lozada and the others were attempting to hitch Lozada's car up to a tow truck (1136).

Maria Leonardo, a housewife, testified that she has known the defendant, Carlos Lozada, for 10 or 11 years. She also resided at 132 Eldridge Street (1162-63) above the Lozada apartment (1163). On July 29, 1975, she saw Carlos Lozada at approximately 7:15 p.m. standing in front of the house (1163). She had opened her window to look

for her own son when she noticed the defendant (1163). At 7:30 p.m. she went downstairs and again saw Lozada near the car which had broken down (1164). When she returned to the house at 10:00 p.m. she did not see Lozada (1165).

Aida Rodriguez testified that she saw Carlos Lozada a little after 6:00 p.m. At the time she was in the company of Mrs. Lozada, the defendant's wife. She testified that she had come from defense counsel's office. The two women then went upstairs to the defendant's mother's house (1173). She again saw Lozada at 6:30 p.m. when she went downstairs. She accompanied Frances Lozada to the drugstore in Imperiale's car and returned to 132 Eldridge Street shortly before 7:00 and then saw the defendant. The next time she saw Lozada was after 10:00 when she and her husband drove them home (1176).

Sergeant **Clifford Leinberger**, 16th Homicide, testified that on August 1, 1975, he saw the defendant in custody wearing a white T-shirt and a pair of dark trousers. Sgt. Leinberger was responsible for the preparation of the line-up (1192-93).

Frances Lozada, the wife of the defendant, testified that she lived at 9061 198th Street in Hollis. Prior to that she lived at 131 Eldridge Street in Manhattan (1248-49). Mrs. Lozada identified the photograph of the green Chevrolet as a car that she and her husband had purchased (1252).

On July 29, 1975, at approximately 5:00 p.m., Mrs. Lozada came to the office of defense counsel, Mr. Lopez. She stayed at his office until 6:00 p.m., at which time she went

to Eldridge Street. She was accompanied by Aida Rodriguez. Upon arriving in Eldridge Street, she saw her husband, the defendant, standing in front of the candy store (1253). Lozada was standing with his boss. Mrs. Lozada got out of her car, spoke to her husband and then went upstairs to her mother-in-law's house. The car was parked in front of 132 Eldridge Street. Her mother-in-law told her that one of the Lozada children had run out of baby formula. Mrs. Lozada then went back downstairs and told her husband that she was going to get formula. She got into the car, but the car would not start. She called her husband over. At that time, her husband, his boss and a few other men in the area unsuccessfully tried to start the car (1254). She did not know the names of any of the other men (1254-55). Her husband then directed her to telephone the mechanic. She then called J. Hill Auto Shop (1255). She spoke to a man named Al Coldiaro. This conversation occurred at approximately 6:45. She then went across the street and borrowed her husband's boss' car. She also told her husband what the mechanic had said. She went to the pharmacy and purchased a case of formula (1256). She then returned to her mother-in-law's apartment (1259). At this time it was approximately 7:20 p.m. She recalled seeing her husband at this time also (1260).

The Chevrolet in question was purchased at Reedman Motors (1260). At ten minutes to eight, a tow truck arrived at Eldridge Street (1264). She signed a receipt made out by J. Hill Auto Collision at approximately 8:00 p.m. (1266). On July 30, Mr. and Mrs. Lozada picked up the car at J. Hill Auto Collision, located on Lefferts Boulevard (1268). They drove the car back to their Hollis home.

The next morning at approximately 5:30 a.m., Mr. and Mrs. Lozada drove to Reedman Motors (1270). They arrived at Reedman Motors at 8:45 a.m. Then there came a time when they left Reedman Motors and went shopping (1273). They had no baggage with them on the day they went to Reedman Motors (1276).

On cross-examination, Mrs. Lozada testified that she and her husband left Eldridge Street at approximately 9:45 and arrived at their home in Hollis a little after 10:30. Their house is located one-half block away from the intersection where the homicide took place. She further stated that the intersection in question is visible from the street in front of her house. She stated that she did not see any police cars in the area at the time she got home (1357). She saw no police barriers, no police line. She did not see a body in the street. She did not see blood stains in the street. In fact, she heard nothing about a shooting that night (1358).

Carlos Alejandro testified that on July 29, 1975, he was at 131 Eldridge Street. He arrived at that location between 3:00 and 3:30 p.m. (1399). At approximately 5:00 p.m., the defendant Carlos Lozada entered the store and went into the back, where there was a small gym (1400). Later that evening, he saw the defendant go across the street to his mother's house (1401-02). Less than an hour later, the witness saw Lozada come back out of the house and go toward his car. At about 8:00 p.m. he saw the car being towed away (1402-03).

Rebuttal

John D'Amato testified that he is a garage foreman in Queens General Hospital (1427-29). One of the responsibilities of his garage is to pick up and deliver bodies to the Medical Examiner's Office. On July 29, 1975, a vehicle was dispatched to pick up the body of Daniel Georgi (1429). A request to pick up Georgi's body was made at 10:58 p.m. (1432). The vehicle responded to the scene at 11:00 p.m. The body was picked up at 11:07. They left the scene at 11:14. Arrived at the morgue at 11:25. The vehicle used was a regular City ambulance (1433).

Police Officer **Michael McCarthy** testified that on July 29, 1975, he resided in the vicinity of 198th Street and 90th Avenue in Queens County (1440-41). On that date, he left his home and went to the intersection of 198th Street and 90th Avenue at approximately 5 minutes to 7:00 (1441). Patrolman McCarthy testified that he remained at the scene from the time he got there until approximately 11:30 p.m. (1443). When he left the scene he estimated that there were approximately 25 to 35 people at the intersection. The police were still at the scene at the time he left (1444). He testified that 198th Street is a one-way street running north to south; that is, from Hillside Avenue south. 197th Street is a one-way street running from south to north (1445).

He stated that in order to approach the 90-100th block on 198th Street, one had to pass through the intersection of 90th Avenue and 198 Street, unless one drove the wrong way on the one-way street (1446).

REASONS FOR DENYING *CERTIORARI*

POINT ONE

The evidence of flight was properly admitted. The purpose of the trip to Langhorn, Pennsylvania, was undisputed and was clearly established on the record. No error was committed [answering appellant's Point I, brief, pp. 12-15].

It is undisputed that on July 31, 1975, two days after the homicide, defendant and his wife left the jurisdiction and travelled to Langhorn, Pennsylvania. It is also undisputed that the purpose for their trip to Langhorn, Pennsylvania, was to trade in the 1973 Chevrolet that was owned by the defendant's wife and which the People contended was the car driven by the defendant prior to and immediately after the homicide. Indeed, this proof was elicited on cross-examination of the People's witness Detective Cama and on direct examination by the People of witness Trooper McAndrew (686, 737). That these facts were not in dispute is clearly demonstrated by the statements summarizing these facts made by defense counsel in his own summation.

The issue in dispute, of course, was not whether the defendant and his wife had gone to Langhorn, Pennsylvania in order to sell their car. Rather, it was whether or not that fact permits the inference that the defendant was seeking to flee the jurisdiction and suppress evidence of the crime, that is, the car; or, as appellant contended whether their intention to sell the car was simply as a result of the mechanical difficulty that they had had with the car on

July 29, 1975. Clearly, the prosecution argued quite appropriately for the former inference, and defense counsel argued equally appropriately for the latter inference. The inference to be drawn was properly left as a question of fact for the jury to resolve.

There is no contention herein that the charge to the jury with respect to the issue of flight was improper. Indeed, the only issue raised by appellant is that the court failed to permit an "explanation of his alleged flight to Pennsylvania" through the testimony of the defendant's wife (appellant's brief, p. 12). But as previously indicated, the purpose for this trip to Pennsylvania had clearly been established by the People and was absolutely undisputed by defense counsel. Moreover, an examination of the testimony of Mrs. Lozada fails to reveal any effort on the part of defense counsel to elicit the purpose of the trip. As such, the issue is moot. As to those particular questions to which the court sustained objections, it is clear that the inquiries were improper. The two questions concerning Pennsylvania, which were disallowed by the court on p. 1261, were clearly leading. The question disallowed on p. 1274, that is, what items the defendant and his wife purchased in Pennsylvania on that day, were hardly probative of the issue involved and the refusal of the court to permit the defendant's wife to testify as to their intended destination was clearly proper as the testimony would have been inadmissible as the self-serving statement of a person in privity with the defendant [*Richardson on Evidence,* 10th Ed., §§356-357]. In sum, the issue to be resolved was clearly before the jury and no error was committed.

POINT TWO

Appellant received a fair trial. Those comments of the prosecutor and the trial court cited by appellant in his brief were the mild restrained responses to the constant, virulent attack launched upon them by defense counsel [answering appellant's Point II and IV, brief, pp. 15-17, 18-25].

Appellant contends that his constitutional right to a fair trial was abrogated by certain comments made by the trial court and by the prosecutor. Appellant's claim is without merit.

Throughout the course of the proceedings below, defense counsel, Mr. Austin Lopez, conducted himself in a manner—be it calculated or not—designed to harass, intimidate, and frustrate the efforts of the trial court and the prosecutor in their efforts to perform their duty. He consistently delayed the proceedings by means of long pauses between questions during his cross-examination—this despite repeated pleas from the court that he prepare his cross-examination in advance, he took unduly long periods of time to review *Rosario* material that in many instances was but a few pages of testimony; he consistently refused or ignored rulings of the trial court; he vociferously and inexplicably accused both the trial court and the prosecutor of race prejudice, despite a total absence of evidence to that effect (139-40, 232, 235, 243, 264, 310, 319-20, 371-72, 425, 505, 530, 547, 562, 656, 864-66, 908-10, 912-13, 924-26, 1503, 1523, 1530, 1532-33, 1538, 1540, 1546-47).

Appellant on appeal takes the traditional tack of singling out specific instances of the sharpest rebukes of the

trial court and one improper statement by the prosecutor on summation, and argues that the cumulative effects of these statements was to deprive the appellant of a fair trial. Obviously these statements are all taken out of context. The traditional response of a prosecutor is to take the statements complained of, place them in their proper context, and either seek to justify them or explain the minimal impact that the statement had upon the jury's deliberations. In this case, however, respondent respectfully eschews this form of argument. Instead, we join with the trial court in commending this record in its entirety for review by this Court (410, 426). Respondent is confident that upon reading this record in its entirety, this Court will recognize that Mr. Justice Smith conducted this trial with an extraordinary degree of restraint, and that appellant was afforded a fair trial only because of the remarkable efforts of the trial court to deal with the outrageous behavior of defense counsel in as calm and dignified a manner far beyond that which defense counsel's behavior deserved. It is, of course, axiomatic that a trial court has a right and duty to govern the proceedings before him [*People* v. *Ohanian,* 245 N.Y. 227, 232; *People* v. *Mendes,* 3 N.Y. 2d 120].

Respondent respectfully submits that the recent Court of Appeals decision in *People* v. *Gonzalez,* 38 N.Y. 2d 208 is dispositive of this issue. In that case, the court made the following observation:

> Although the trial court exhibited a certain degree of acrimony during the several heated exchanges with defense counsel, we must consider the context in which this occurred. Defendant's trial lasted for approximately three weeks and was marked by aggressive ad-

> vocacy on the part of both the defense and prosecution. Defense counsel, a retained attorney, persistently failed to obey proper evidentiary ruling and engaged in tactics designed to disrupt and to infuriate throughout the trial and summation. When such a situation is created by defense counsel, defendant may not, absent other circumstances, successfully allege he was deprived of a fair trial. The trial court was justified, indeed obligated, to assume aggressive control of the proceedings to insure a fair trial (*People* v. *Marcelin,* 23 A D 2d 368, 260 N.Y.S. 2d 560 [Eager, J.]). Significantly, the prompt, curative instructions by the trial judge should have served to dispel any prejudice and to emphasize to the jury that their only concern was to assess the defendant's guilt or innocence rather than the conduct of counsel or the court. Accordingly, we conclude that the trial court, under extraordinary difficult circumstances, preserved the defendant's right to a fair trial.

We respectfully submit that the circumstances at bar parallel that discussed in the *Gonzalez, supra,* case. The defendant was clearly afforded a fair trial.

POINT THREE

The trial court properly denied without a hearing defense counsel's motion to disqualify the jury panel [answering appellant's Point III, brief, pp. 17-18].

Appellant's contention that Mr. Justice Smith should have granted him a hearing upon his challenge to the jury panel is clearly without merit. In the first place, §270.10 of the Criminal Procedure Law specifically provides that such a challenge must be made in writing. In the case at bar, the challenge was oral. Moreover, the statute also provides that the defendant must allege that the manner in

which the panel was selected violated the requirements of the Judiciary Law. No such contention was made in this case. Rather, defense counsel merely objected upon his visual evaluation that the panel did not appear to contain people who were 18 years old. His motion clearly fell far short of the statutory requirement and was properly summarily rejected by the trial court. *People* v. *Prim*, 40 N.Y. 2d 946 (1976); *People* v. *Parks*, 41 N.Y. 2d 36 (1976); *People* v. *Consolazio*, 40 N.Y. 2d 446 (1976).

POINT FOUR

The testimony of the children was properly admitted into evidence [answering appellant's Point V, brief, pp. 25-26].

Among the several eye-witnesses to the crime, the defendant was identified as the killer by Edward Geraghty, Jr., a 10-year old boy and two 13-year old boys, Arthur Verdecchia and Rafael Cruz. Appellant argues that the testimony of these three boys should have been suppressed by the trial court. Appellant's contention is without merit.

A full and complete *Wade* hearing was held on the question of whether the police-arranged confrontations improperly influenced the capacity of these witnesses to make an in-court identification of the defendant. At the conclusion of the hearing, Mr. Justice Smith denied appellant's motion. The propriety of that motion is apparently not contested on appeal.

Appellant does argue, however, that the testimony of these three witnesses should nevertheless have been suppressed by the court simply because of the ages of the witnesses. His contention is clearly without merit. In the first place, with respect to Rafael Cruz and Arthur Verdecchia, both boys were 13 years old at the time of the trial. Section 60.20 of the Criminal Procedure Law specifically holds that witnesses over twelve years old, in the absence of any demonstration that they were possessed of insufficient intelligence or capacity to testify, are properly sworn by the court.

With respect to the testimony of Edward Geraghty, Jr., the record indicates that Mr. Justice Smith clearly complied with the statutory requirements before permitting him to testify. He conducted a *voir dire* and determined to his satisfaction that the witness understood the significance of the oath that he was about to take. Appellant's contention that the court was obligated to permit defense counsel to conduct his own *voir dire* on this issue is unsupported by any statutory or case authority. Indeed, in view of the statutory obligation imposed upon the court to satisfy itself, the better practice would clearly appear to be for the court to conduct its own examination. In any event, in view of the fact that this entire area is well within the discretion of the trial court it is clear that no error was committed. The cases relied upon by appellant, *People* v. *Oyola*, 6 N.Y. 2d 259 and *People* v. *Porcero*, 6 N.Y. 2d 248 do not stand for the proposition that testimony such as that at bar should be suppressed. Rather, they merely caution that such testimony should be carefully scrutinized.

POINT FIVE

The issue of whether or not the *Rosario* material should have been turned over to defense counsel out of the presence of the jury is not preserved for review. In any event, there is no such requirement under New York case law [answering appellant's Point VI, brief, p. 26].

Appellant contends that it was improper for the district attorney to turn *Rosario* material over to defense counsel in the presence of the jury. No objection to this manner of receiving material was in fact made at the trial level. Indeed, defense counsel, on a number of occasions, complained vociferously in front of the jury about the alleged incomplete nature of the *Rosario* material. Such complaints clearly inured to the detriment of the People and to that extent, gave defense counsel a tactical advantage in that it permitted him to impune the good faith of the prosecutor in front of the jury. In any event, although some federal courts apparently do require that *Rosario* material be turned over out of the presence of the jury, it does not appear to be such a requirement under New York case law. The one New York case cited by appellant, *People* v. *Damon*, 24 N.Y. 2d 256, simply does not touch on the issue. In any event, in view of the actions taken in the trial court by defense counsel, he is hardly in a position to allege error on appeal.

POINT SIX

The trial court properly refused to charge the jury on the affirmative defense of extreme emotional disturbance [answering appellant's Point VII, brief, p. 27].

Appellant's request to have the affirmative defense of extreme emotional disturbance charged to the jury in an effort to reduce the murder charge to manslaughter in the first degree was properly refused by the court. Counsel on appeal misconstrues the meaning of extreme emotional disturbance. He urges that in view of the fact that there was an altercation during a hot summer day that resulted in this homicide, the case properly fits within this category. This contention is erroneous. The meaning of extreme emotional disturbance, a section that was lifted almost verbatim from the Model Penal Code, deals not with a situation arising out of an altercation, but rather "the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance" (Model Penal Code Commentary, Tent. Draft #9, pp. 40-41).

In the case at bar there is not a scintilla of evidence demonstrating even a prior relationship between the appellant and the deceased. As such, appellant's position is totally unfounded. No error was committed.

Conclusion

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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